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In the Supreme Court of the United States

OCTOBER TERM, 1975

EXHIBITORS POSTER EXCHANGE, INC.,
Petitioner

versus

NATIONAL SCREEN SERVICE CORPORATION, et al.,
Respondents

AND

THE POSTER EXCHANGE, INC.,
Petitioner

versus

COLUMBIA PICTURES CORP., et al.,
Respondents

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

ARGUMENT

Respondents' Brief in Opposition is less remarkable for what it says than for what it does not say.

Most significant is the absolute failure to deny that the effect of the decision below is to invest the respondents with immunity from liability for future violations of the antitrust laws of the United States.

As this Court said in the *Lawlor* case (349 U.S. at 329):

> "Such a result is consistent with neither the antitrust laws nor the doctrine of res judicata."

Moreover, it is not denied that in the Atlanta phase of this litigation one of the respondents - National Screen Service Corporation - after a full-dress trial on the merits, was found guilty of using "grossly predatory practices"[1] in violation of the antitrust laws and has been compelled to comply with a money judgment of Four Hundred Fifty Thousand and No/100 ($450,000.00) Dollars.

The effect of the decision below is to authorize this grossly predatory monopolist - National Screen Service Corporation - to continue its unlawful practices in the New Orleans motion picture district, with immunity from liability for an indefinite time in the future.

In other words, National Screen Service Corporation is actually authorized to do in New Orleans what it has been roundly condemned for doing in Atlanta.

And all of this is in plain conflict with the unanimous opinion written for this Court by the then Chief Justice in the *Lawlor* case.[2]

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1. *Poster Exchange Inc. v. National Screen Service Corp.*, 431 F2d 334, 341 (5th Cir. 1970) cert. den. 401 U.S. 912; rehearing den. 401 U.S. 1015.

2. *Lawlor v. National Screen Service Corp., (1955) 349 U.S. 322.*

The respondents attempt to distinguish *Lawlor* on the ground that the judgment involved in that case was entered by consent of the parties, whereas the judgments entered in the instant cases were entered summarily.

This distinction is said to constitute a major difference - it is said that a consent judgment ". . . could not possibly form the basis of a judicial estoppel" (Respondents' Brief at p. 8).

But the *Lawlor* opinion, itself, stands for the exact opposite of that.

More fully, in *Lawlor* the Court said (349 U.S. at 327):

> "It is of course true that the 1943 [consent] judgment dismissing the previous suit 'with prejudice' bars a later suit on the same cause of action" (Citing cases).

It is therefore submitted that respondents' attempt to distinguish *Lawlor* must be rejected.

The plain truth is that the decision below, if allowed to stand, would emasculate *Lawlor.*

Other noteworthy aspects of respondents' brief are, we submit, as follows:

1.

At Page 7 respondents state that: "*Lawlor* did not deal with the doctrine of collateral estoppel at all but rather with res judicata . . .", but the fact is that collateral estoppel

is twice referred to and rejected in *Lawlor*.

More fully, in its first reference, this Court, quoting with approval the court below, said (349 U. S. at 326):

> "No question of collateral estoppel by the former judgment is involved because the case was never tried and there was not, therefore, such finding of fact which will preclude the parties to that litigation from questioning the finding thereafter."

And in a second reference, this Court said (349 U. S. at 327):

> "It is likewise true that the [former] judgment was unaccompanied by findings and hence did not bind the parties on any issue - such as the legality of the exclusive license agreements or their effect on petitioner's business - which might arise in connection with another cause of action. To this extent we are in accord with the decision below. We believe, however, that the court erred in concluding that the 1942 and 1949 suits were based on the same cause of action."

It is clear, therefore, that this Court expressly rejected both res judicata and collateral estoppel, and it is equally clear that the decision below is in plain conflict with what this Court said.

2

Respondents' brief ignores the fact that in the leading case of *Cromwell v. County of Sac* (1877) 94 U.S. 351, this Court stated, in substance and effect, that a litigant can be collaterally estopped only by issues of fact that have been "actually litigated" and that litigation requires the verdict of a jury or the finding of a trier of facts.

Similarly, respondents ignore the fact that in the Restatement of Judgments (§ 68, Comment c) it is stated that a question of fact can be said to be *litigated* only when "a question of fact is put in issue by the pleadings and is submitted to the jury or other trier of facts for its determination . . ."

The respondents do not cite either the Restatement or *Cromwell v. County of Sac.*

3

Respondents state (at Pages 3 and 5) that the summary judgments entered in these cases were accompanied by "findings" of fact but we submit that it is too obvious for argument that on a motion for summary judgment the motion judge has no power to make findings of fact. If there are findings to be made, the motion for summary judgment must be denied and the case listed for trial.

4

At Page 11, respondents assert that:

> ". . .it is settled law that the formalities of a trial . . . are not prerequisites

> to the application of the doctrine of collateral estoppel."

That statement of the law is said to be supported by the Supreme Court case of *Napa Valley Elec. Co. v. Railroad Commission*, 251 U.S. 366 (1920).

But the fact is that in the *Napa Valley* case, the court was not concerned with the doctrine of collateral estopel.

In that case, the ruling was that a second proceeding was based on the same cause of action as that involved in the first proceeding, and that, therefore, the plaintiff was barred by res judicata.

The doctrine of collateral estoppel is not even mentioned in the opinion of the Court.

Respondents cite also *Thomas v. Consolidated Coal Co.*, 380 F2d 69 (1967) but that case also deals solely with res judicata; collateral estoppel is not mentioned.

As aforesaid, in *Lawlor* this Court said that:

> "No question of collateral estoppel by the former judgment is involved because the case was never tried . . ." (349 U.S. at 326).

It is submitted that neither the court below nor counsel have been able to cite any authority contrary to petitioners' contention that there can be no collateral estoppel unless a question of fact has been actually litigated and determined after a trial before a jury or other trier of facts.

It is therefore submitted that this Court should review the decision below and reverse it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply Brief have been served on Tench C. Coxe, 1400 Candler Building, Atlanta, Georgia, 30303; Phillip A. Wittman, 1000 Whitney Building, New Orleans, Louisiana, 70130; Walter S. Beck, 40 West 57th Street, New York, New York, 10019; and Gibbons Burke, One Shell Square, New Orleans, Louisiana 70139, this 18th day of December, 1975.

C. ELLIS HENICAN, JR.